

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

INDEX

Falls Church, Virginia 22041

File: A14 262-818 - Otay Mesa

Date: JUN 16 1999

In re: JUAN GABRIEL EDUARDO BARRAGAN a.k.a. Juan Mancilla

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Karla L. Kraus, Esquire
110 West "C" Street, Suite 1809
San Diego, California 92101

ON BEHALF OF SERVICE: Marianne A. Pansa
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Termination of proceedings

ORDER:

PER CURIAM. The respondent appeals from the Immigration Judge's January 11, 1999, decision finding him removable as charged as an alien convicted of an aggravated felony under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), and ineligible for any relief from removal. The appeal will be sustained and these proceedings will be terminated.

On appeal, the respondent challenges the Immigration Judge's finding that his conviction was for an "aggravated felony" within the meaning of the Act.¹ He further submits evidence that on April 16, 1999, the Superior Court of California, County of San Diego, modified his sentence to 220 days' confinement.

¹ We note that the respondent also raises a number of issues on appeal relating to bond and whether he should have been released from custody. Bond proceedings are conducted separate and apart from any deportation or removal hearing or proceeding. See 8 C.F.R. § 3.19(d). Thus, this Board may not address any claims relating to bond in the context of these removal proceedings.

The record reflects that the respondent was convicted on November 16, 1993, for the offense of assault with a deadly weapon (not a firearm), for which he was sentenced to 220 days in prison and 3 years' probation (Exh. 2). He was later resentenced on June 2, 1994, to 365 days in prison and 3 years' probation (Exh. 2). While the Immigration Judge did not specify what the basis was for his determination that the respondent's conviction was an "aggravated felony," we conclude that at the time of the Immigration Judge's decision, the respondent's 1993 conviction fell within the definition of "aggravated felony" contained in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). That section includes within the definition of aggravated felony "a crime of violence . . . for which the term of imprisonment [is] at least one year."

However, the respondent has presented on appeal information showing that his sentence was modified *nunc pro tunc* on April 16, 1999, to reflect a sentence of 220 days' confinement. We previously have found, in an analogous context, that where an alien is resentenced for a crime at a later date, it is the new sentence that must be used in determining whether the alien was sentenced to "confinement for a year or more," and thus deportable under the prior section 241(a)(4) of the Act. See Matter of Martin, 18 I&N Dec. 226 (BIA 1982) (deportation proceedings terminated because alien's sentence was modified to less than 1 year, and thus she was not deportable). We cannot agree with the Immigration and Naturalization Service that Matter of Roldan, Interim Decision 3377 (BIA 1999), extends to the question of the effect of modification of an alien's sentence. In Matter of Roldan, we solely addressed the definition of "conviction" contained in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), whereas the definition of "term of imprisonment" is set forth in section 101(a)(48)(B). Matter of Roldan did not address the impact of a sentencing modification and in no way indicated that it superseded or overruled our decision in Matter of Martin, *supra*. Therefore, we decline to extent its holding to this context.

The proceedings will be terminated inasmuch as the respondent has presented evidence that although he has been convicted of a crime of violence, the "term of imprisonment" for that conviction was for less than 1 year (220 days), and thus the offense no longer falls within the definition of "aggravated felony" contained in section 101(a)(43)(F) of the Act. The respondent, therefore, is not removable as charged. Accordingly, the appeal will be sustained and the Immigration Judge's decision will be vacated.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision dated January 11, 1999, is vacated.



FOR THE BOARD